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IN THE

Supreme Court of the United States

October Term 1957

No. [redacted] 72

STANISLAW NOWAK,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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No. 729

STANISLAW NOWAK,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

The Interest of the National Lawyers Guild

The National Lawyers Guild is a national Bar association concerned not only with the interests of the legal profession but with its responsibilities, among them the duty to defend the constitutional rights of the people against government encroachment. To that end it has intervened in significant cases involving such rights.

The National Lawyers Guild intervenes in this denaturalization case because the issues herein are of basic importance, constitutionally and socially. This case involves the oft-recurring issue of the power of government in the area of opinion and association, and the issue in this

instance arises in a case where the exercise of those constitutional rights, if the government's position is upheld, threatens the naturalized citizen with loss of his citizenship during his entire lifetime.

These are matters which go beyond the limits of this case or the interest of this appellant. It is our duty to uphold First Amendment rights against abridgment and to resist the effort of government to penalize the exercise thereof, as in this instance by denaturalization. Further, the status of citizenship is a precious right, one which this court has evaluated as "all that makes life worth living". Its value extends beyond the individual to the entire society. The assertion of power by government to strip it from any alien at any time for his opinions and associations is a social and economic deprivation for the naturalized millions and for the native, between whom the years have formed firm ties.

The National Lawyers Guild has a special interest in this case because it deems the statute here involved to constitute an infringement upon the rights and power of the judiciary and upon the sanctity of judicial decree.

Respectfully submitted

OSMOND K. FRAENKEL,
Counsel for Petitioner.

Introduction

As the complaint is framed in this proceeding, the issue is whether proof that a citizen, naturalized in 1938, was a member of the Communist Party at the time of his naturalization is proof (1) that he was not of a good moral character and was not attached to the principles of the Constitution, and (2) that he lied when he said that he was so attached and when he denied association with any organization which teaches or advocates anarchy or the violent overthrow of existing governments. The first formulation states a charge of illegal procurement; the second, a charge of fraud.

In the light of the holding in *Schneiderman* v. *U. S.*, 320 U. S. 118, and of the opinion expressed in Justice Douglas' concurrence therein at page 165, that "where all the express statutory conditions precedent are satisfied * * * the judgment of naturalization is final and conclusive except for fraud", we can dispose summarily of the charge of illegal procurement, echoing the recent holding of this Court in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244:

> "During the period when [he] was a member, the Communist Party was a lawful political party with candidates on the ballot in most States * * * 'Mere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference, negative good moral character'."

We agree with Justice Frankfurter's concurring opinion in the *Schware* case, *supra*, at 251, that "To hold * * * that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted."

The 1906 statute with which we are here concerned did not bar members of the Communist Party from citizenship nor did it prohibit the naturalization of members of or-

ganizations advocating forcible overthrow of the government. Members of such organizations who were granted citizenship under the 1906 statute did not, therefore, gain their citizenship by "illegal procurement"; no "express statutory conditions precedent" were flouted.

The question remains whether false denial or concealment of such membership constituted such a fraud upon the court as to vitiate the court's finding of good moral character. Here the Government's argument is simple to state: Under the 1906 statute Communists could perhaps become citizens but liars could not.

As no one is a liar who states what he believes to be true (whether in fact it be true or not) the Government bears the burden of proving not only that petitioner *was* a member of an organization advocating forcible overthrow but that he knew he was. (It should be noted that the lower court did not credit the evidence that petitioner was asked about and denied membership in the Communist Party as such.) Petitioner's brief properly directs itself to the question of whether, in fact, petitioner knew or should have known that his answers concerning membership in organizations advocating forcible overthrow and his avowals of attachment to the principles of the Constitution were false. We shall not duplicate this argument. We shall rather direct ourselves to two broader questions: 1—whether the First Amendment permits Congress to authorize cancellation of citizenship for fraud based upon a finding of concealment of membership in a political organization (even if that organization advocates forcible overthrow); and, 2—whether Article III of the Constitution permits Congress to authorize the courts to review (without time limitation) findings made (and incorporated into a final judgment) concerning good moral character and attachment to the Constitution, when such findings are challenged by new evidence directed solely to proof of concealment of political belief and affiliation.

POINT I

If the statute is construed to permit denaturalization for concealment of political beliefs and affiliation, it is unconstitutional, as a law abridging freedom of speech and assembly in violation of the First Amendment.

There is irony in requiring, as a condition of naturalization, "attachment to the principles of the Constitution" and, in the same breath, attacking as a fraud upon the court, the concealment of political beliefs and affiliations. For, "if any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guarantees of the Bill of Rights and especially that of freedom of thought contained in the First Amendment. Cf. Justice Holmes' dissent in *U. S.* v. *Schwimmer* (279 U. S. 644)". *U. S. v. Schneiderman,* 320 U. S. 118, 144.

In the *Schneiderman* case, this Court, finding the evidence insufficient to support denaturalization for "illegal procurement" based on lack of attachment, did not reach the question of the conflict between the statute and the inhibitions of the First Amendment. But the majority opinion there could hardly have afforded clearer implication of what the holding would have been had the question been reached. Only the year before, in the ringing words of *W. Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, the Court struck down, as violative of the First Amendment principles, a statute which sought to compel "compulsory unification of opinion". When such a court, reviewing a denaturalization decree, says, as it did in *Schneiderman,* "Our concern is with what Congress meant to be the extent of the area of allowable thought under the statute" (320 U. S. at 139, and again at 144), it is fair to assume that the tone is sardonic in the extreme. For we, who are deeply "attached to the principles of the Constitution" and especially to the safeguards of freedom

of thought and association therein, are unwilling to believe that this Court will ever consider that Congress has the authority—in any area of its enumerated or implied powers—to delimit the "extent of the area of allowable thought".

Congressional authority, under Art. I, Par. 8, to establish a uniform rule of naturalization is no broader than any of its other enumerated powers, and the exercise of this authority is subject to the restrictions of the First Amendment. The plenary power of Congress to regulate immigration has cast an aura of confusion over the limitations upon Congress' power to deal with aliens within our borders. See *U. S.* v. *Witkovich*, 353 U. S. 194, 201, and especially the dissent therein at 208. The notion that alien-born persons, even after they have been granted citizenship status, remain 'wards of U. S. District Attorneys, U. S. investigators, U. S. judges" (*Meyer* v. *U. S.*, 5th Cir. 1944, 141 F. 2d 825, 831) persists in segments of the judicial as well as the executive and legislative branches, in spite of repeated pronouncements to the contrary.

There is considerable doubt of the power of Congress even to deny *admission* to the country to a person whose only alleged disability is the belief he holds. *Turner* v. *Williams*, 194 U. S. 279, 293-4. And compare *U. S.* v. *MacIntosh*, 283 U. S. 605, 619, with *Girouard* v. *U. S.*, 328 U. S. 61, 69. Further, it is clearly established that the First Amendment applies as well to aliens as to citizens. *Bridges* v. *Wixon*, 326 U. S. 135, 148; *U. S.* v. *Witkovich*, *supra*, at 201. And, even were we to concede—which we do not—that Congress may authorize denial of naturalization on the basis of political belief and affiliation alone, it must be remembered that "the denial of application for citizenship * * * presents a problem very different from the revocation of a naturalization certificate once admission to the community of American citizenship has been decreed." *Baumgartner* v. *U. S.*, 322 U. S. 665, 675.

In discussing whether the abjuration of governmentally prohibited political belief and affiliation can properly be considered a criterion of attachment to the Constitution, and hence a prerequisite of citizenship, we wish to make clear at the outset that we are *not* dealing with the situation faced by this Court in *Knauer* v. *U. S.*, 328 U. S. 654. We may say that we disagree with much of the reasoning in *Knauer* and we believe that to regard a naturalized citizen's oath of allegiance as "a promise of future conduct", and to regard his certificate of citizenship as subject to cancellation for breach of that promise is to create a second-class citizenship which the Constitution nowhere permits and which the courts have decried. *Minor* v. *Happersett*, 21 Wall. (88 U. S.), 162, 165; *Elk* v. *Wilkins*, 112 U. S. 94, 101; *Luria* v. *U. S.*, 231 U. S. 9, 22. We do nevertheless agree that Congress, in providing a uniform rule of naturalization has a right to demand a sincere oath of single allegiance and to require a new citizen to swear truly that he has severed his ties of allegiance to his native land. *Knauer* was decided on the basis of a finding that when defendant renounced allegiance to the country of his birth—Germany—he did so with tongue in cheek. ("The conclusion is irresistible, * * * that when he foreswore allegiance to the German Republic he swore falsely * * *. Since fraud in the oath of allegiance which Knauer took is sufficient to sustain the judgment below, we do not reach the other questions which have been argued", *Knauer* v. *U. S.*, *supra*, at 660, 674.)

There is no such issue here. Petitioner's oath of allegiance is not challenged; there is no breath of a suggestion that petitioner retained any attachment to his native land. Rather, as the lower court herein phrased it, "the rivalry here is not between land of birth and land of adoption, but between the latter and a political ideology" (133 F. Supp. at 196).

Under the First Amendment, such a concept of "rivalry" is wholly untenable, and *Knauer* is no authority

for the proposition that concealment of a political ideology constitutes a fraud upon the court.

Nor is there any other precedent in this Court to establish Congressional power to condition continuing citizenship upon full disclosure of political belief and abjuration of prohibited doctrine. While lower court precedents abound, (see Comment: Attachment to the Principles of the Constitution in Naturalization Cases, 1 Ala. L. R. 228-58 (1949)), the *Schneiderman* case was, as this Court pointed out (320 U. S. at 123), "the first case to come before (it) in which the government sought to set aside a decree of naturalization years after it was granted on the charge that the finding of attachment was erroneous." This Court refused to do so. In *Baumgartner* v. *U. S.*, 322 U. S. 665, this Court also refused to approve a denaturalization decree; there the issues partook partly of the problem in *Schneiderman* and partly that of divided allegiance as in *Knauer*. There have been no cases since in this Court. The slate is clean.

It is highly questionable that Congress intended to use the term "attachment to the principles of the Constitution" to include an unquestioning patriotism. As Judge Learned Hand said in *U. S.* v. *Rossler*, 2d Cir., 1944, 144 F. 2d 463, 465:

> "That attachment to the principles of the Constitution which the law exacts at naturalization * * * demands no affection for, or even approval of, a democratic system of government, but merely an acceptance of the fundamental political habits and attitudes which here prevail and a willingness to obey the laws which result from th m * * *. Patriotism is not a condition of naturalization, any more than it is a test of continued native citizenship * * * the test * * * [is] only the honesty of his declaration that he was ready to abide by the laws of the United States * * *."

If the term "attachment" means more than this, if the oath of allegiance is designed as a test oath for the suppression of heretical beliefs, the statute is invalid under the First Amendment. Compare Justice Frankfurter's dissent in *W. Virginia Board of Education* v. *Barnette*, *supra*, at 664, with the majority approach and treatment of the meaning of the flag salute. Only because Justice Frankfurter was able to see in the pledge of allegiance to the flag "no kinship whatever to the oath tests so odious in history"; only because he was able to find that "saluting the flag (which is to say, pledging 'allegiance to the flag of the United States of America and to the Republic for which it stands') suppresses no belief nor curbs it"; only because the taking of the pledge left both the children and their parents free "to disavow as publicly as they chose to do the meaning that others attach to the gesture of salute", was he able to view the pledge requirement as consonant with the constitutional protections of freedom of thought and speech. The majority, viewing the pledge in a different light—as the Government seeks to have the Court view it here—was forced to declare the statute unconstitutional as violative of First Amendment principles.

What remains is the proposition that even though petitioner could not be denied citizenship (nor, surely, lose it now, retroactively) because of his beliefs and affiliations had he admitted them, still, the fact that he concealed such beliefs or affiliations shows him to have been an unworthy person, of bad moral character.

To this we say that if petitioner's beliefs and affiliations were not material to the grant of citizenship, he had no duty to disclose them to the examiners or to the court. Compare *U. S.* v. *Kessler*, 3d Cir. 1954, 213 F. 2d 53, with *Corrado* v. *U. S.*, 6th Cir. 1955, 227 F. 2d 780, where the line of demarcation is clearly drawn as to the effect of concealment, in naturalization cases, of a criminal record.

Moreover, if he has such a duty, we must ask with the court in *U. S. v. Kusche*, S. D. Cal. 1944, 56 F. Supp. 201, 237:

> "Can it be that the alien is guilty of fraud as to what his thoughts and beliefs are because he did not disclose (if he did not disclose) them to an examiner voluntarily? He had been repeatedly asked if he was an anarchist or a polygamist, or believed in assaulting or killing officials of this or other governments, or believed in overthrowing this government by force and violence. Must he then in addition to that disclose to the naturalization officials, voluntarily, his opinions and beliefs on the entire gamut of *actual* and *possible* political views?"

Finally, and simply, we cite *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 262, 267, 269-71, and *Sweezy* v. *State of N. H.*, 354 U. S. 234 at 255.

POINT II

If the statute is interpreted to authorize the courts to cancel a decree of naturalization upon review (without time limit) of the original grant, it is unconstitutional under Article III, Section 2.[1]

It does not necessarily offend one's basic notions of civilized conduct to consider that the naturalized citizen should be placed on a lower rank than the native-born,

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[1] Constitution of the United States of America, Article III, Section 2.

[§ 1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different

that citizenship should be granted him only as a boon and not as a matter of right, nor that such a grant, once made, should be revocable at the will of the government. Under the laws of many countries of the western world today and in the recent past this has been the situation. The Dominican Republic grants conditional naturalization which can be cancelled within five years but is thereafter definitive. Chap. III, Art. 17, Nationality Act, No. 1863 of April 16, 1948; U. S. Doc. 475 at p. 128. British law which, during the 19th century, treated the grant of citizenship as a royal prerogative, even now allows for revocation of a certificate of naturalization upon an administrative finding that "the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to his Majesty". British Nationality and Status of Aliens Act, 1914, as amended, 1918, c. 83, Sec. I, Stats. of England 189, 190; Repeated in Act of July 1948, Sec. 20(3)(a), U. N. Doc. 475.

But the United States Congress is not free to adopt this approach. It has only the powers expressly granted to it and it is subject to the restrictions imposed upon it by the Constitution. Under the Constitution naturalized and native-born citizens stand upon an equal footing (but for the

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States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[§ 2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[§ 3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

qualification to serve as President), *Minor* v. *Happersett*, 21 Wall. (88 U. S.) 162, 165, and cases cited with it, *supra* (p. 7). And Congress' power to deal with the Matter is limited to the power granted in Article I, Sec. 8, "to establish an uniform rule of naturalization".

For the better part of our history as a nation it was not thought that the power to establish a rule of naturalization carried with it any power, express or implied, to authorize the cancellation of citizenship. On the contrary,

> "The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *Osborn* v. *Bank*, 9 Wheat. (22 U. S.) 738, 827; cf. *Spratt* v. *Spratt*, 4 Pet. (29 U. S.) 393."

As this Court said in *U. S.* v. *Wong Kim Ark*, 169 U. S. 649 at 703, "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

Of course, the power to grant a status and to set the conditions for such grant clearly implies the power to withhold the grant from a specified class of persons. But neither in logic nor in law does it imply the power to destroy the individual's status once it has been granted. Expressed in terms of law, it is unlikely that the suggestion would be seriously entertained that Congress, having the power under Article IV to admit new states to the Union, has a corresponding authority to expel states which have been brought into the Union by exercise of this power. Phrased in terms of the logic of human morality, it may be conceded that parents are free to have or not to have a child, but if they have brought the child into being they are not free to destroy it.

It is because of this lack of power to establish rules of *de*naturalization and because of the constitutional inhibi-

tions against the creation of second-class citizenship for the foreign born that the law of denaturalization came into being so late in our history and developed in the unique and peculiar way in which it did. The only theory, consonant with the Constitution, upon which citizenship could be revoked (as distinguished from voluntary renunciation) was the theory that it had never been properly granted in the first place—that the original decree of naturalization was faulty and that the status of citizenship had never come into being.

It is upon this theory that all the legislation is ostensibly based and it is this theory which the courts have used to justify nullification of judicial decrees upon subsequent findings of "fraud" or "illegal procurement".

The early cases in this Court turned on a finding of (1) lack of jurisdiction in the courts to grant citizenship to persons who were ineligible by reasons of race, *Yamashita* v. *Hinkle*, 1922, 260 U. S. 178, and *Toyota* v. *U. S.*, 1925, 286 U. S. 402 (Japanese), and *Thind* v. *U. S.*, 1923, 261 U. S. 204 (Hindu); for compilation of lower court cases see *U. S.* v. *Kusche, supra*, 56 F. Supp. at 213-15; (2) failure to meet purely formal requirements, such as possession of a certificate of arrival, *U. S.* v. *Ness*, 245 U. S. 319; *Maney* v. *U. S.*, 278 U. S. 17, viewed as demonstrating a lack of jurisdictional prerequisites rendering the grant of citizenship a nullity. In a case involving a failure to meet the residence requirements, this Court went so far as to say that "every certificate of citizenship must be treated as granted upon condition that the government may challenge it * * * and demand its cancellation unless issued in accordance with such requirements." *U. S.* v. *Ginsberg*, 243 U. S. 472, 475.

There may have been justification for this approach at a time when a grant of citizenship was an *ex parte* decree where the government had no chance to appear in opposition, *Johanessen* v. *U. S.* (1911), 225 U. S. 219, 239, nor

to appeal from the decree, *U. S.* v. *Ness* (1917), 245 U. S. 319. But it has since been firmly established that an appeal from the grant of naturalization does lie, *Tutun* v. *U. S.*, 270 U. S. 568, 575, and, as this Court pointed out in the *Schneiderman* case, *supra*, at 123, "we are dealing here with a court decree entered after an opportunity to be heard." Citing the *Tutun* case, this Court noted, at 124, Note 3, that the courts' jurisdiction is subject to Article III and pointed out that "For this reason it has been suggested that a decree of naturalization * * * cannot be compared (as was done in *Johanessen* v. *U. S.*, 225 U. S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations". The majority expressly refused to rule upon the question, but Justice Rutledge in his concurrence adopted the suggested viewpoint, saying, at pp. 168-9:

> "* * * it is a *judgment*, rendered in the exercise of the judicial power created by Article III, which it is sought to overthrow, not merely a grant like a patent to own land or for invention. Congress has plenary power over naturalization. That no one disputes. Nor that this power, for its application, can be delegated to the courts. But this is not to say, when Congress has so placed it, that body can decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under Article III merely an advisory opinion * * *. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority."

Justice Douglas, concurring, took the view that judgments of naturalization are final and conclusive "except for fraud". If the kind of fraud Justice Douglas had in

mind was the type asserted here—concealment of a state of mind or of political belief or affiliation—then his opinion has little meaning beyond that of procedural niceties and comes most oddly in the *Schneiderman* case of all cases. For there has been no clear line of distinction between what constitutes "fraud" and what "illegal procurement". (See the perceptive analysis of the confusion on this subject in Maloney, Involuntary Loss of American Citizenship, 4 St. Louis U. L. J. 50, 53-5). In the *Schneiderman* case itself, the Government originally proceeded on both charges (on the same proof) and abandoned the fraud charge only because it had won on the other in the Court of Appeals. See 320 U. S. at 122.

Of course, it is hornbook law that judgments are binding except for fraud. But if everything and anything can be classified as "fraud", what is the value of the maxim? This Court has held the plaintiff to most stringent rules of pleading and evidence in fraud cases. "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry", *Wood* v. *Carpenter*, 101 U. S. 135, 143.

Both the courts and the legislature (see 8 U. S. C. 1451(e)) have in fact been unwilling to accept the full consequences of the government's theory of denaturalization for fraud—a voiding of the judgment *ab initio*, a declaration that the citizenship status never existed. In *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, neither the majority nor the dissenting justices were willing to accept the idea that a naturalized citizen who committed a crime and was *thereafter* denaturalized for fraud in the procurement of citizenship should be regarded as one who had never ceased to be an alien. In that case the Government argued, with the full logic of the legal fiction behind it, that Eichenlaub was deportable as an alien, that he had never achieved citizenship status because his decree had been obtained by fraud. No member of this

Court accepted that view. The majority avoided the issue, saying, " * * * it is not necessary to give retroactive effect to the denaturalization orders * * * the Act does not require that offenders must have had the status of aliens at the time they were convicted" (at pp. 529-30). Justice Frankfurter's dissent (in which Justices Jackson and Black concurred) sought to view the denaturalization as prospective in effect and analogized it to loss of citizenship by so-called voluntary expatriation which does, of course, operate only for the future. But if denaturalization is to be accomplished within the framework of the Constitution it *is* necessary to give "retroactive effect" to the denaturalization order. For unless the order was void *ab initio* it *must* be proof against subsequent attack for intrinsic fraud. The doctrine of *U. S.* v. *Throckmorton,* 98 U. S. 61, 65, has not been laid to rest.

If we can realize that whether we call the problem one of "illegal procurement" or "fraudulent procurement" or failure to meet "jurisdictional requirements", we are dealing with a case—and behind it and ahead of it scores of similar cases—in which final judgments granting citizenship to persons who meet the objective qualifications are vitiated ten, twenty, thirty years later because the political climate has changed and the citizens' "loyalty" is questioned, we will be closer to an understanding of the problem and a solution of it.

This is not the kind of fraud for which Congress did or could intend to vitiate a judgment. Certificates of citizenship were never intended to be "licenses to be an American, * * * as easy to revoke as a driver's license", *Maloney,* op. cit. at 55.

CONCLUSION

We urge this Court to restore the concept of citizenship to its proper and deserved status and to insure that the words of the Fourteenth Amendment—"*All* persons born or naturalized in the United States * * * *are* citizens of the United States * * * " have real meaning to the foreign-born among us.

Respectfully submitted,

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